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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC.,
a corporation,
Petitioner,

vs.

COMMODITY CREDIT CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Earl C. Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Rosenberg Bros. & Co., Inc., a corporation, prays that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered on the 7th day of March, 1957 (petition for rehearing and for hearing in bank denied May 13, 1957),

which reversed a decision of the District Court for the Northern District of California, Southern Division in favor of Plaintiff (Petitioner herein).

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit of which this petition seeks a review was officially reported in 243 F.2d 504, et seq. The opinion of the District Court for the Northern District of California, Southern Division, appears in the printed record before the Court of Appeals for the Ninth Circuit at page 51 et seq., and in the official reports in 123 F.Supp. 764. A copy of the decision of the United States Court of Appeals for the Ninth Circuit appears in the Appendix hereto.

GROUNDS ON WHICH JURISDICTION INVOKED

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed and entered on March 7, 1957, and the petition for rehearing and for rehearing in bank was denied on May 13, 1957. Jurisdiction to review this case on a writ of certiorari is conferred upon this Court by Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Whether the Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: The express or implied contractual liability of the Commodity Credit Corporation (hereinafter referred to as CCC), an agency of the United States Government, in its dealings with private contracting parties under an industry-wide program.

(2) Whether the Court of Appeals for the Ninth Circuit has in this proceeding so far departed from the accepted and usual course of judicial proceedings and from decisions of the United States Supreme Court as to call for an exercise of this Court's power of supervision.

(3) Whether the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with another decision in the same circuit and with decisions of the courts of other circuits on an identical issue.

(4) Implicit in the decision of the Court of Appeals in this matter is the further question of whether or not a corporate agency of the United States, in its dealings with individuals and corporations, is to be held to the same standards of contractual obligations and ethics as are the persons and corporations with whom it is dealing.

STATUTES AND RULES INVOLVED

Fed. Rules of Civil Procedure, Rule 52(a):

"Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions

of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). (Emphasis Added)

STATEMENT OF THE CASE

This case is one of ten similar cases* involving substantially all the independent packers in the raisin industry. In July, 1947, an Industry Committee in which Department of Agriculture officials participated, as well as the Department itself, estimated the 1947 industry surplus of Thompson seedless raisins at 100,000 tons or more. With this estimate before him, Clinton Anderson, the then Secretary of Agriculture (who was also Chairman of the Board of CCC, and exercised all rights of stock ownership on behalf of the United States) stated his determination not to support prices for dried fruits; and further stated that he would purchase no more dried fruit than could be used by the school lunch program, by the program of regular shipment

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*Nine other cases are pending in the United States District Court for the District of Columbia:

TITLE	CIVIL ACTION NO.
Vagim Packing Company v. Commodity Credit Corporation	4474-50
Central California Packing Company v. Commodity Credit Corporation	4475-50
Lion Packing Company v. Commodity Credit Corporation	4476-50
Enoch Packing Company, Incorporated v. Commodity Credit Corporation	4477-50
Bonner Packing Company v. Commodity Credit Corporation	4478-50
Fewel Bros. Packing Company v. Commodity Credit Corporation	4479-50
Central Valley Raisin Company v. Commodity Credit Corporation	4480-50
West Coast Growers and Packers, Inc. v. Commodity Credit Corporation	4481-50
Hunt Foods, Incorporated v. Commodity Credit Corporation	4482-50

to the Armed Forces, and by subsidizing export into the Northern countries where dried fruits were an important and valuable part of the diet; that CCC's dried fruit purchase program offered a decidedly limited outlet; and that there would be no waste of product as there had been in the case of potatoes. Anderson also indicated that CCC would take raisins only at prices at which they could move into countries where foreign exchange was a problem, and at which CCC could resell to the Army which was at the time "somewhat of a tough trader".

With this background, Anderson, serving also as Chairman of the Board of CCC, on September 5, 1947, issued a carefully prepared announcement to packers, growers and the public of the general outline of the dried fruit program which CCC had adopted as Docket OC-95a. (Plaintiff's Exhibit 5). The announcement stated that CCC would purchase up to a *maximum* of 61,000 tons of raisins *from processors and packers,** and expressly stated that the program "does not provide price support at any given level". Purchases were to be made on the basis of competitive bidding. This was the only announcement of the *entire* purchase program.

Rosenberg Bros. & Co. (hereinafter referred to as Rosenberg), to whose claim Petitioner has succeeded by operation of law, was one of the most important packers in the raisin industry. It, together with other packers, (all of whom were in a short position at the time CCC called for bids†) urged

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*The words "processors" and "packers" have identical meaning for the purpose of this petition.

†In the early season before raisins were made, packers were normally and necessarily in a short position. This situation was aggravated in 1947 by grower resistance to sales at prevailing market prices. CCC had knowledge of the packers' short position when it accepted their bids.

CCC not to put this kind of a program into effect as it would work out uneconomically. Calling for *competitive* bids on a *maximum* of 61,000 tons of raisins in the face of a known estimate of a 100,000 ton surplus would depress prices. Rosenberg even suggested an alternative procedure. Nevertheless, Rosenberg and other packers were told that the program "as announced" by CCC was a substantial contribution toward stabilized conditions in the industry and were instructed to "cooperate".

Accordingly, Rosenberg committed itself to sell to CCC a total of 14,333 tons of processed raisins at prices ranging from $149.40 to $152.00 per ton. Rosenberg's formal offers for parts of the tonnage on which CCC had called for bids, were made on mimeographed CCC bid forms, and CCC accepted the formal offers by telegram. Rosenberg's last offer for 4,330 tons was accepted by CCC by night-letter dated October 13, 1947. Prior to this time, on October 9, 1947, unknown to the packers and processors, CCC had changed its mind about the type of program which it wanted to put into effect, and had determined *first,* to increase the maximum quantity of raisins to be purchased from 61,000 tons to 121,000 tons (a tonnage in excess of the indicated surplus) and *second,* to accept offers from raisin growers, and others in physical possession of raisins, in direct competition with processors and packers. These changes were announced to the packers on October 14 after their bids had been accepted. Later, on November 26, 1947, CCC announced that it would require all processors to certify that they had paid growers not less than $135.00 per ton for natural condition raisins. (Note: The spread between the price of natural condition raisins and the price for processed raisins called for by CCC was established and found to be $40.00 per ton. In order to avoid a

loss on sales to CCC at $150.00 per processed ton, it was necessary for the packers to buy from growers at not more than $110.00 per ton.) The certification requirement, contrary to CCC's original announcement of September 5, 1947, in effect, supported field prices for natural condition raisins at a level of $135.00 per ton. The October 14 changes in CCC's program, together with the November 25 certification requirement, necessarily meant that packers who purchased raisins to cover their short position on their CCC bids, at a price artificially stabilized at or near $135.00 per ton would be out of pocket approximately $25.00 per ton.

The change of the CCC requirements, contrary to CCC's original announcement, put CCC in the market for more than the indicated surplus instead of only 61,000 tons, put CCC in direct competition with packers for grower's raisins, and instituted a price support program. Immediately after the announcement of these changes in the program, Rosenberg and other packers sought to cancel their contracts with CCC. Rosenberg even went so far as to offer to cancel all of its existing grower contracts for raisins that called for firm prices of less than $140.00 per ton, which would have enabled the released growers to enjoy the benefits of the new CCC program. Despite the recommendations of his CCC advisors, including S. R. Smith, the head of the Fruit and Vegetable Branch and author of CCC's dried fruit purchase docket, Secretary Anderson refused to cancel or renegotiate the packer contracts. He testified that his reason was that a business deal had been made and CCC could not give up a favorable contract at a low price.* For a period of months thereafter Rosenberg sought to obtain relief from its CCC commitments but met with no success.

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*His insistence on performance of these low-priced contracts is characteristic of an ordinary commercial purchase by CCC rather than of a price support program.

After the change in program was announced on October 14, 1947, growers became strong holders, and it was impossible for Rosenberg and the other packers to cover their contracts with CCC except at a loss. Rosenberg did cover its CCC commitments at prices which resulted in a substantial loss. Despite continuing negotiations to adjust this matter, CCC insisted that Rosenberg perform its contracts, and on January 26, a formal demand was made on it. After an exchange of telephone calls and telegrams with CCC's contracting officer, Rosenberg delivered the raisins but actively continued its efforts to obtain relief from CCC during the period of delivery and afterwards.

The trial court held that CCC had breached its implied contract not to hinder Rosenberg's performance or render it more expensive, and found that as a result of such breach, Rosenberg had suffered damages in the amount of $160,366.88. CCC appealed this judgment to the Court of Appeals for the Ninth Circuit. Rosenberg contended that its damages were in excess of $320,000.00 and cross-appealed on that issue.

The Court of Appeals completely rejected Rosenberg's position and the decision of the trial court, holding that even if CCC had breached a contract with Rosenberg by changing its program on October 14, 1947, Rosenberg should have minimized its damages by doing nothing after CCC's breach. In other words, Rosenberg, the innocent party to the contract, should have ignored CCC's insistence on performance and the pending attempts at settlement, and should have taken no steps to cover its contract with CCC. This decision would require Rosenberg to determine at its peril whether CCC's breach was a good defense to an action by CCC for nonperformance. Moreover, had Rosenberg and other packers in a similar position taken no steps to cover

their CCC commitments, an industry disaster would have resulted. The Court of Appeals also held that there was no contract which precluded CCC from changing its program to the damage of the obligated processors; that there was no implied contract on the part of CCC not to prevent or hinder the packers' performance; and that Rosenberg in delivering raisins to CCC and billing the CCC on standard voucher forms, had waived any claim to damages.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The jurisdiction of the Court of first instance in this matter is based upon Title 15 U.S.C. Section 714(b)(c).

> "The District Courts of the United States * * * shall have exclusive original jurisdiction of all suits by or against the Corporation [Commodity Credit Corporation]."

ARGUMENT

(1) The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Implicit in the decision of the Court of Appeals is a dictum that CCC in its dealings with private contracting parties under an industry-wide program is not subject to the usually implied obligation not to hinder or prevent performance by the other party. In spite of the extended attention to this point in briefs of counsel, the Court of Appeals dealt with it in a summary fashion and its pronouncements on the issue are merely dicta. The actual *ratio decidendi* of the Court's opinion is that had Rosenberg acted so as to minimize its damage, it would allegedly have suffered no damage, and that in any event Rosenberg waived any right to damage by delivery.

There was presented to the Court an important question, to-wit: What is the effect of a carefully prepared announcement of a CCC commodity purchase program by the Secretary of Agriculture, publicly made and mailed to packers including Rosenberg, following preceding studies and prior announcements to the effect that there would be no price support at any given level and that only limited quantities which could be used for specified purposes would be purchased. In asking—actually, demanding—that the industry comply with the program "as announced", and in accepting bids made in reliance on such announcements, was there not clearly established a contractual relationship? Or, if any of the elements of an express contract were lacking (a question which the United States District Court did not decide) was CCC not subject to an implied obligation not to hinder or prevent performance by the processors involved, including Rosenberg? This implied promise, as suggested by the Court of Appeals, does not depend upon the theory that the September 5th announcement was a *part* of the contract, or that CCC *agreed* not to purchase more than 61,000 tons, to purchase only from processors and packers, and not to support prices. The implied promise is not to hinder or prevent the processors from performing their part of the contract. CCC's change in program did render performance by Rosenberg and other packers more difficult and expensive. Rosenberg did not, as stated by the Court of Appeals (contrary to the finding of the trial court), assume the risk of a change in program.

A contract not to hinder or prevent performance by the other party to a contract is "nearly always" implied. 3 *Corbin on Contracts* (1951 Ed.) § 571; 4 *Ibid.* § 947; *Patterson v. Meyerhofer* (1912) 97 N.E. 472, 204 N.Y. 96. It is only upon proof of exceptional circumstances that the other

party is regarded as having "assumed the risk" of hindrance. *Restatement of Contracts*, § 315; *Williston, Contracts* (Rev. Ed.) § 1293-A. Clinton Anderson's September 5th announcement, even if it be regarded merely as a statement of policy, was clear and unequivocal. In the light of subsequent conduct of CCC officials rejecting any change in the program "as announced", it cannot be held that Rosenberg "assumed the risk" of a change in program.

The Government of the United States and any agency thereof in its dealings with individuals and corporations should be held to the same standards of contractual obligations and ethics as are the persons and corporations with whom it is dealing. This statement would seem too obvious to require the attention of this Court, but throughout the decision of the Court of Appeals there is every indication that what is good for the goose is not necessarily good for the gander. Had a private individual made the announcement of September 5th, and made statements as to the purpose and limitations of it, there is no doubt that the announcement would have been construed either as part of the contract with the individual processors, or as representation precluding assumption of risk that the performance of the contract would be interfered with or prevented. Had such a statement been made with an intention to deceive or to induce the processors to purchase, it actually would have been considered fraudulent in its nature.

The trial court found that the September 5th announcement induced Rosenberg and other processors to enter into the formal contracts with CCC and that a necessarily implied term thereof was that there would be no interference with Rosenberg's contractual performance. How, in the light of this finding, the Court of Appeals could find otherwise, with no additional or other evidence before it, is incomprehensible.

It is respectfully submitted that this Honorable Court should unequivocally decide, for guidance of the courts of the various circuits, whether a Government agency's representations or contracts should be treated in the same manner as those of private individuals. If the Court of Appeals intended to find such a difference on the grounds of sovereign immunity it should have so declared. Nowhere does the opinion of the Court of Appeals deal with the question of sovereign immunity despite the fact that it was strenuously argued and briefed at length. Of course, petitioners do not believe that sovereign immunity excuses the action of the Government in the instant case, but petitioners do contend that the silence of the Court of Appeals on this point, alone, would call for consideration by this Honorable Court.

The importance of the questions here involved is emphasized by the nine other actions brought on similar facts by substantially all of the independent raisin packers now pending before the District Court for the District of Columbia, which require guidance of the United States Supreme Court for their ultimate disposition.

(2). The Decision of the Court of Appeals Has Departed from the Accepted and Usual Course of Judicial Proceedings and from Decisions of the United States Supreme Court and Decisions in Other Circuits.

(a) MITIGATION OF DAMAGES.

The holding of the Court of Appeals that Rosenberg—whether or not it had been induced to enter into its contract by fraud, or whether or not CCC had any contractual obligation, express or implied—had the duty, effective immediately upon learning of the drastic change by CCC of its originally announced raisin purchase program, to reduce damages by not covering on its contractual obligation, clearly calls for a final determination by the highest tribu-

nal. Such a determination is particularly necessary because of the fact that a Federal agency was the contracting party pressing for performance by Rosenberg.

The Court of Appeals in deciding this question, looking at the matter coldly from its elevated bench, completely ignored the evidence before the trial court and applied legal principles as if this were a case for mitigation of damages after *repudiation* by CCC. It ignored the findings of fact that throughout the period when Rosenberg covered its CCC commitments, CCC was insisting on performance,* and Rosenberg was seeking an adjustment from CCC which would be fair to both parties; and that such adjustment had the approval of the head of the Fruit and Vegetable Branch, the man in charge of the 1947 Dried Fruit Purchase Program (Plaintiff's Exhibit 50), though denied by the Secretary of Agriculture.

The Court made an error of law in applying the principle of mitigation of damages to the facts of this case. CCC's breach of its contract coupled with its continuing insistence on performance, gave Rosenberg an election of remedies (1) to rescind; (2) to treat the contract as broken and sue for damages; or (3) to consider the contract as binding, continue the performance and sue for damages for breach. An innocent party to a contract *may* stop his performance upon breach by the other party, but he is not *required* to do so. He may continue to perform, insofar as he is permitted, and then claim damages for the breach of contract. It has been so held in another circuit.

> *Bu-Vi-Bar Petroleum Corp. v. Krow* (C.C.A. 10, 1930), 40 F.2d 488, 490.

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*The trial court found (Finding 38) that Rosenberg "continually and consistently sought cancellation" of its contracts, but "CCC refused at all times to cancel" and "continually and repeatedly insisted on delivery".

The great weight of authority is in accord.

Winans v. Sierra Lumber Co. (1884), 66 Cal. 61, 4 Pac. 952;

2 *Fed. Law of Contracts*, § 429;

5 *Corbin on Contracts* (1951 Ed.), § 1105, p. 469;

Williston, Contracts (Rev. Ed.), § 1298.

The rule of mitigation of damages, which requires the innocent party to cease performance upon breach by the other party to a contract, applies only in case the other party *repudiates* the contract or breaches it in a manner tantamount to a repudiation. Here CCC not only failed to repudiate its contract with Rosenberg but, indeed, insisted on performance after its breach.

(b) FAILURE TO FOLLOW FINDINGS.

The Court of Appeals in this matter has thoroughly and completely ignored the findings of fact of the trial court, without finding that the evidence was not sufficient to support them. (Actually it was more than sufficient to do so.) If this Honorable Court will compare the trial court's findings with the opinion of the Court of Appeals, it may well wonder if both courts considered the same case.

It does not, of course, appear from the cold record that this was a rather dramatic case in which Secretary of Agriculture Anderson showed on the witness stand his spleen against and animosity toward the packers in general (Record pp. 243-244; 306-309; 447). This is illustrated by the very fact that Secretary Anderson took a positive view, contrary to that of responsible department technicians with respect to adjustment of the packer contracts, referred to the packers in rather uncomplimentary terms, and announced that he would "teach them a lesson". The then Cali-

fornia Senator, Sheridan Downey, testified as to his efforts to assist in this matter, as to how unfair the transaction had been, as to how he had almost obtained relief and then failed. These and other dramatic circumstances, including the forthright demeanor of plaintiff's witness Dwight Grady, make the judgment of the trial court on factual matters superior to the review thereof by the appellate tribunal. The Court of Appeals has completely ignored the findings of the trial court. For example, whether Rosenberg made delivery without waiving its rights is a question of fact. The trial court found that there had been no waiver and that Rosenberg had continuously from and after October 14, 1947, pressed its claim for adjustment of its CCC contracts. Witness what the Court of Appeals has to say on this issue:

> "There was, in fact, no disputed claim on Rosenberg's part, which was advanced by it or recognized by the government, when Rosenberg performed the contracts."

Where did the Appellate Court find evidence of this? There are other illustrations of utter disregard of the findings. The important finding of the trial court that Rosenberg did not assume the risk of a change in CCC's program, and that Rosenberg was entitled to damages because of injuries suffered, and similar findings vital to the conclusions of the Court, were completely and thoroughly disregarded. We submit that this definitely is a violation of the accepted and usual course of judicial proceedings, of Rule 52(a) of the Federal Rules of Civil Procedure, and of prior decisions of the United States Supreme Court.

Walling v. General Industries Co. (1947), 330 U.S. 545, 91 L.Ed. 1088;

Graver Tank & Mfg. Co. v. Linde Air Products Co. (1949), 336 U.S. 271, 93 L.Ed. 672, *aff'd* 339 U.S. 605, 94 L.Ed. 1097.

This violation calls for exercise of this Honorable Court's supervisory power.

(3) The Decision of the Court of Appeals for the Ninth Circuit as to the Effect of Execution of Government Vouchers Is in Conflict with Another Decision in the Same Circuit, as Well as with a Decision in Another Circuit.

In the instant matter the Court of Appeals held that Rosenberg's use of standard voucher forms, in billing CCC for raisins delivered, which forms included a statement that the bills presented were "correct and just" and that all conditions applicable to the transactions had been complied with, and Rosenberg's acceptance of payment of these vouchers, waived any claim for damages on account of CCC's breach of contract. This holding completely disregards Rosenberg's conduct up to and after the very time of execution of the vouchers. During this entire period Rosenberg was actively and continuously pursuing its claim for additional damages, and the trial court so found. Not only is the holding of the Court of Appeals contrary to the finding of the trial court, but, important for consideration of this petition for a writ of certiorari, it is in conflict with the decision of the court in *Lundstrom v. United States* (D. Ore. 1941) 53 Fed. Supp. 709, 711, aff'd (C.C.A. 9, 1943) 139 F.2d 792. It is also in conflict with the decision of the Eighth Circuit in *Blair v. United States* (C.C.A. 8, 1945) 147 F.2d 840, modified in other respects (C.C.A. 8, 1945) 150 F.2d 676.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit failed to decide an important question of law which should be settled by this Court; it departed from the accepted and usual course of judicial proceedings and is in conflict with prior decisions of the United States Supreme Court, as well as with another decision in the Ninth Circuit and a decision in another circuit on an identical issue. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted so that the said decision of the United States Court of Appeals for the Ninth Circuit may be reviewed and, upon review, reversed by this Honorable Court.

Dated at San Francisco, California, this 29th day of July, 1957.

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(Appendix Follows)

Appendix

United States Court of Appeals
For the Ninth Circuit

No. 14,884—Mar. 7, 1957

Commodity Credit Corporation,
Appellant,

vs.

Rosenberg Bros. & Co., Inc., a Corporation,
Appellee.

and

Rosenberg Bros. & Co., Inc., a Corporation,
Appellant,

vs.

Commodity Credit Corporation,
Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: DENMAN, Chief Judge, and MCALLISTER and BARNES, Circuit Judges.

MCALLISTER, Circuit Judge.

OPINION

Rosenberg Bros. & Co., Inc., hereinafter called "Rosenberg," sued the Commodity Credit Corporation, hereinafter called "Commodity" or "the government," for breach of con-

tract, and, on a trial before the district court, sitting without a jury, secured a judgment in its favor in the amount of $160,366.88. Both parties appeal, Rosenberg claiming that it is entitled to more; the Commodity Credit Corporation claiming that it is entitled to nothing.

The background of the case is as follows: On September 10, 1947, pursuant to a government program to support and stabilize the prices of dried fruits, the Secretary of the Department of Agriculture, who was also the Chairman of the Commodity Credit Corporation, asked for offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits. Rosenberg, on September 19, offered to sell 10,000 tons of raisins to Commodity at prices ranging between $151 and $152 per ton, according to the kind of containers used. Rosenberg's offer was accepted by Commodity on September 23. On September 24, a standard government contract was executed between Rosenberg and Commodity, by the terms of which Rosenberg agreed to deliver 10,000 tons of raisins to Commodity in the period October 1-December 15, 1947, upon demand and at the prices set forth in the contract. These raisins were never delivered in accordance with the contract. Rosenberg, at the time it executed the contract, did not have the raisins on hand or available. It was selling them in the expectation that raisins would drop in price sufficiently to enable it to fulfill the contract without loss. On October 1, 1947, the Department of Agriculture asked for further bids for the sale of dried fruits, including 31,000 tons of raisins. A week later, on October 8, Rosenberg offered to sell Commodity 10,000 tons of raisins, and on October 13, Commodity accepted Rosenberg's offer to the extent of 4,330 tons, priced at $149.40 per ton, and on the same day, a contract was executed for that quantity of raisins at the stated price.

On October 14, the Department of Agriculture announced further purchases, and asked for bids for an additional 60,000 tons of raisins. Rosenberg then requested cancellation of its contracts, but this request was denied.

On November 26, 1947, the purchasing program of raisins was modified by requiring all packers who *thereafter* sold Thompson seedless raisins (the kind here in question) to certify that they had paid the grower not less than $135.00 per ton.

At the time of the execution of the contracts, Rosenberg, as has been mentioned, had not purchased and did not have available raisins to fill the government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable it to fulfill the government contracts without loss. However, the growers refused to sell at the lower prices offered, and Rosenberg purchased only 800 tons during the period from September 1, 1947, to November 3, 1947, during which time it had agreed, in the written contract, to sell to the government a total of 14,330 tons of raisins.

After November 3, 1947, raisins were sold by growers in substantial quantities at prices ranging from $127.00 to $142.00 per ton. Since Rosenberg's normal processing and packing charges averaged $40.00 per ton, it was impossible for Rosenberg to purchase raisins from growers for sale to the government at $149.40 or $152.00 per ton, in compliance with its contracts, without suffering substantial loss.

The government continually demanded delivery of the raisins from Rosenberg; and Rosenberg continually refused to deliver, stating that it had no raisins available.

In January, 1948, the price of raisins dropped, and during that month, they were being sold by growers at prices ranging from $100.00 to $125.00 per ton. At that time,

Rosenberg decided to make delivery to the government, since, at that price, it would be enabled to purchase raisins at the lower prices, and fulfill its government contracts.

On January 22, 1948, Rosenberg requested shipping instructions and asked for an amendment to the contract, relating, however, only to reinstating the tonnage and extending the delivery dates. The government agreed to an amendment reinstating the tonnage and extending the delivery dates, and further agreed not to hold Rosenberg for damages for nondelivery, or delay in delivery, in return for Rosenberg's waiving all carrying charges. Delivery of the orders was then made by Rosenberg during February and March, 1948. Vouchers for the raisins delivered were submitted by Rosenberg and paid by the government. Thereafter, Rosenberg filed a claim against the government for damages for breach of an implied contract, on the theory that the government, through changes in its program of purchasing raisins, had obstructed Rosenberg in the performance of its contract, and, at the same time, had increased the cost of such performance. Upon the government's rejection of its claim, Rosenberg brought the present action, and the district court, sitting without a jury, entered a judgment in favor of Rosenberg in the amount of $160,366.88, from which the government appeals.

It is the chief contention of the government that there was no implied contract with Rosenberg, and, consequently, no breach of such a contract.

Rosenberg claims that a "press release" issued by the Secretary of Agriculture at Albuquerque, New Mexico, on September 5, 1947,[1] forms the basis of the implied contract;

[1]The press release is as follows:

"Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the

and that, in effect, it became part of the contract when Rosenberg made an offer of sale of the raisins to the government based upon the terms of the press release, and upon which, the government accepted such offer. Rosenberg contends that the government breached its contract by purchases of raisins contrary to the terms of the press release and by subsequently imposing further conditions upon sales by Rosenberg which greatly increased the cost of Rosenberg's performance of its contract.

The government submits that the press release in question was not intended to create private contractual rights, and that it created none; that it contained no representations of a contractual nature; and that it was merely a declaration of policy.

When, on September 10, 1947, the government invited orders for the sale of 30,000 tons of raisins to be delivered during the period October 1, 1947 to December 15, 1947,

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purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.

"The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.

"Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.

"Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.

"The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.

"Department officials stated that the program should enable the dried fruit industry to complete its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of the dried fruit surplus problems."

there was no mention of its announcement of the press release of September 5, 1947. Furthermore, when, on September 19, 1947, Rosenberg submitted an offer to sell 10,000 tons of raisins to the government at prices ranging between $151.00 and $152.00 per ton, no reference was made, in such offer, to the press release. Finally, on September 23, 1947, when the government accepted Rosenberg's offer, and when, on the following day, a standard government contract was executed in which Rosenberg agreed to deliver 10,000 tons of raisins to the government during the period, October 1-December 15, 1947, upon demand and at the prices stated therein, no reference was made to the press release, either in the government's acceptance of Rosenberg's bid or in the terms of the formal written contract; and the same is likewise true of Rosenberg's sale to the government of 4,330 tons of raisins on October 13, 1947.

If this case is to be determined on the basis of written contractual stipulations between the parties—the invitation to bid, the bid, and the acceptance—the government is not liable to Rosenberg in any amount. It is only on the theory of some kind of implied contract that Rosenberg seeks to prevail.

Where the parties have deliberately put their engagement into writing, the writing is presumed to contain the entire contract, and all the prior and contemporaneous agreements are merged therein, and cannot be shown by parol evidence. The contract may be read in the light of surrounding circumstances in order more perfectly *to understand the meaning and intent of the parties;* but where a contract is unambiguous, there is no need to ascertain the meaning and intention of the parties outside of the terms of the agreement. *United States v. Fidelity & Deposit Co. of Maryland,* 152 F.596 (C.C.A. 2). The rule that the surrounding circum-

stances should be considered does not apply where the language of a written agreement is plain, and not susceptible of more than one meaning.

Rosenberg, however, relies upon the rule that each party to a contract impliedly agreed not to prevent the other party from performing, or to render performance impossible by any act of his own. It contends that the government agreed not to purchase more than 61,000 tons of raisins during its entire program, and, moreover, that the purchases would be made from processors and packers; and this contention is based solely on what was set forth in the press release above mentioned,[2] none of which was mentioned or referred to in the written contract executed between the government and Rosenberg. By virtue of the press release alone, Rosenberg founds its case on breach of implied contract. We do not consider that the government can be held to have agreed with Rosenberg, implicitly or expressly, by virtue of the press release, not to purchase more than 61,000 tons of raisins; and that a subsequent purchase by the government of more than this amount gave Rosenberg a right to damages.

The government agency here involved, the Commodity Credit Corporation, was created by Congress for the purposes, among others, of stabilizing and protecting farm income and prices; of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, and of facilitating the orderly distribution of agricultural commodities. Title 15 U.S.C.A., Section 714. It was granted the specific powers, by Congress, to support the prices of agricultural commodities through loans, purchases, payments, and other operations; to increase the domestic consumption of agricultural commodities by expanding or

[2]See Footnote 1 **ante.**

aiding in the expansion of domestic markets, or by developing new and additional markets and uses for such commodities; to export, or cause to be exported, or aid in the development of foreign markets for, agricultural commodities. Title 15 U.S.C.A., Section 714c. Having in mind these objectives and powers confided to it by Congress to carry out a vast national program in support of our agriculture, it is impossible to find, in a reading of the "press release" by the government to the public and to agricultural interests as to what the "program" would be, a binding contract with any individual who might thereafter enter into a separate and detailed written contract with the government, that the Commodity Credit Corporation would not subsequently modify any part of the program announced, except at the peril of paying damages of hundreds of thousands, or millions of dollars to anyone who dealt with the Commodity Credit Corporation as a seller, even though such a modification of program might not only be intelligent and beneficent, but absolutely necessary if the agency were to carry out the duties confided to it and imposed upon it by Congress. A reading of the "press release," in the light of the purposes and powers of the Commodity Credit Corporation, as set forth in the statute, does not disclose that the press release must be construed as a binding promise to Rosenberg that the program mentioned therein would not in the future be changed without peril to the government. But it is not necessary to place our determination on the ground that the government did not impliedly agree not to vary its program, as announced in the press release.

Rosenberg had offered to sell 10,000 tons of raisins to the government on September 19, 1947. It had no raisins on hand; and before it delivered any, the government, on October 1, asked for further bids on 31,000 more tons of raisins.

When the government asked for bids on 31,000 more tons, Rosenberg offered, on October 8, 1947, to sell the government another 10,000 tons of raisins in addition to the 10,000 tons it had already sold to it. On October 13, the government accepted Rosenberg's offer to the extent of 4,330 additional tons, which brought the aggregate that Rosenberg had sold to the government, up to that time, to 14,330 tons. None had been delivered.

On October 14, 1947, the government announced that it would purchase 60,000 more tons of raisins, in addition to the 61,000 tons theretofore purchased. Rosenberg then asked that the government cancel its contracts to sell the prior aggregate amount of 14,433 tons. The government refused to cancel. Where did Rosenberg stand then? It had purchased no raisins. It had delivered none. It wanted the government to let it out of the contracts. The government refused. Who was damaged? How much?

If Rosenberg was damaged by reason of the government's announced purchases on October 14, 1947, of 60,000 tons of raisins in addition to the first purchases of 61,000 tons, when was it damaged? If Rosenberg had refused to do anything further, when the government had refused to cancel its contract, on October 14, 1947, what damages would Rosenberg have suffered? Not a penny. It had not delivered any raisins. It had not bought any. It had no claim for damages, and it made no such claim. It only wanted to get out of the contracts. These were the only contracts of sale of the raisins between Rosenberg and the government. How, then, does Rosenberg build up its claim of damages against the government on these contracts to the sum of $329,437.53, which it now claims?

Rosenberg contends that the government caused the prices of raisins to rise in the market by buying more than

the original amount of 61,000 tons, which it had announced it would purchase in its press release of September 5, 1947. It further claims that, when the government, on November 26, 1947, required all packers who thereafter sold raisins, to certify that they had paid the growers not less than $135.00 per ton, it caused an abnormally high rise in the field prices of raisins, and resulted in damage to Rosenberg by reason of its being required to purchase the raisins at such higher prices in fulfillment of the government contracts.

In sum, according to Rosenberg's claim, the government had breached its contract by purchasing raisins in the open market, when it had agreed not to do so—and, further, by subsequently requiring packers, after November 26, 1947, to certify that they had paid growers not less than $135.00 a ton.

We may assume, for the argument, that Rosenberg is right in its contention as to the breach. Then the government was not entitled to delivery of the raisins from Rosenberg after the first breach of contract on October 14, 1947, nor after the second alleged breach on November 26, 1947, and Rosenberg would, accordingly, be discharged from any obligation under the contracts by reason of the government's breach. As has been remarked, at the time of the alleged breaches by the government, Rosenberg had suffered no damages, since it had bought no raisins, and had delivered none. It commenced to purchase raisins to fulfill the government contract only in the latter part of December, 1947. Yet, in spite of these facts, we find Rosenberg, more than three months after the breach by the government of the so-called implied contract, upon which it mainly relies in this case, asking the government to amend the contract by extending the time for delivery of the raisins. No raisins

had been delivered up to the latter part of December, 1947, and, certainly, no claim of damages could have been made up to that time. And no claim of damages was made by Rosenberg when it asked the government to amend the contract as late as January 22, 1948.

The circumstances leading up to Rosenberg's request for revision of the written contract are pertinent. On January 21, 1948, the government demanded that Rosenberg deliver the raisins under the terms of the contract. On January 22, 1948, Rosenberg replied to the government, stating that it had been unable to deliver the raisins "Because of our inability to secure the raisins, due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins into our Fresno plant, and because of our failure to secure any relief from Washington * * *. We are now in a position to make deliveries against this contract, and it is our understanding that before the Shipping and Storage Branch can instruct shipment against this contract, it will be necessary to issue an amendment reinstating this tonnage and extending the delivery date. We will appreciate it if you will furnish such an amendment." No mention was made of any breach up to this time.

On January 26, 1948, the government, in a telegram, emphasized Rosenberg's default in delivery and asked if it would deliver the raisins, provided no damages for nondelivery would be sought by the government, other than the waiver by Rosenberg of carrying charges. The government also stated: "We are willing to take delivery on all of the quantities covered by both the above mentioned contracts *at the contract prices.* * * * We will not pay carrying charges on any raisins * * *. This telegram is sent without prejudice to any rights of Commodity Credit Corporation. If this arrangement is agreeable to you please indicate your

agreement therewith by advising us not later than 500 PM January 28, 1948. Otherwise please indicate your intention as to your performing on these contracts." (Emphasis supplied) Here, the government was saving any rights it had against Rosenberg.

On January 28, Rosenberg responded by telegram, stating: "This Confirms Our Agreement to Extend Period for Shipment as Outlined Your Wire. Will Appreciate Receiving Prompt Shipping Instructions . . ." There was no mention here by Rosenberg of any claimed breach on the part of the government, or any reservation of a claim for damages.

The government thereafter issued shipping instructions and the raisins were delivered in February and March, 1948. Rosenberg thereafter proceeded to bill the government for the raisins delivered under the contracts, as amended, upon standard voucher forms, certified that the bills thus presented were correct and just and that "all conditions of purchase applicable to the transactions had been complied with." No reservations of a claim for damages, or breach of contract, were contained in the voucher forms; and Rosenberg accepted payment of the vouchers, based on the original contracts, at the prices originally agreed upon, as was required by the government when it consented to the amendment of the contract extending time for delivery and waiving any claim for damages on account of Rosenberg's nondelivery up to that time.

It is the general rule that one who is injured by the wrongful acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and, to the extent that his damages are the result of his active and unreasonable enhancement

thereof, or due to this failure to exercise such care, he cannot recover. He is bound to protect himself if he can do so with reasonable exertion or at a trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. He must do nothing to aggravate his loss, but must do all he can to mitigate or reduce it. *Campfield v. Sauer*, 189 F. 576 (C.A. 6).

We do not consider that the government ever breached its contract with Rosenberg; but if it did, Rosenberg was not damaged at the time of the alleged breach in October, 1947, or in the following months of November or December, nor does it claim that it was damaged at that time. It would have been damaged in no way by the claimed breach if it had simply refused to deliver under the contract. Where there has been a breach of contract in a contract of sale, and nothing has been yet done by the seller under the contract, the proper course for the seller is to refrain from doing anything, unless such course, in itself, would enhance the damages which the seller would suffer. And where the seller refrains from doing anything after the breach, the measure of his damages will be only the profit he would have derived had the contract been carried out. Williston on Sales, Section 1299. It is held that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could not prevent. *Warren v. Stoddart*, 105 U.S. 224, 229. A party injured by a breach of contract has no right to perform, if by so doing, damages will be enhanced. It is the duty of the injured party to minimize rather than increase them. A plaintiff cannot hold a defendant liable for damages which need not have been incurred.

If a man engages to have work done, and afterward repudiates his contract before the work has been begun, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The plaintiff must so far as he can, without loss to himself, mitigate the damages caused by the defendant's wrongful act. *Spanish American Line, Inc. v. Baugh Chemical Co.*, 47 F.2d 261 (D.C. Md.). See also Williston on Contracts, Section 1298.

Even in cases where a party has been fraudulently induced to make either a contract of sale or purchase, it follows that if, after full knowledge of the fraud or deceit, he goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is voluntarily incurred. The maxim *volenti non fit injuria* has application to all loss resulting from the voluntary execution of a non-obligatory contract with full knowledge of the facts which render it voidable. Fraud without damage is not actionable. If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, and the loss happens from such voluntary execution, he cannot recover damages which he deliberately elected to incur. The execution of the contract, so far as it was executory after full knowledge of the fraud, is equivalent to an adoption of the contract with full knowledge of the facts. *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 F. 573 (C.C.A. 6). A party to an executory contract procured by false representations who, after knowledge that the representations are false and fraudulent, performs, or, without necessity, completes performance of the contract, and accepts payment according to its terms, thereby waives the fraud. *The Baltimore & Ohio Railroad Co. v. Jolly Bros. & Co.*, 71 Ohio St. 92, 72 N.E. 888.

The Uniform Sales Act provides, in Section 64(4), as follows: "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligation under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand."

The basis of the rule in the above clause is not the fact that the contract is, in the contemplation of the parties, one for the manufacture of goods, but the general obligation must rest upon a party, whose rights have been invaded, to take such a course as is reasonably likely to minimize the damage which he will suffer; and the rule is not confined to cases where there is an anticipatory breach by way of a repudiation of a contract, but applies also where the breach of contract is based upon the buyer's failure to give orders for further deliveries as contemplated by the contract. *Zimmerman Radio Corp. v. Bronson & T. Co.*, 108 Conn. 632, 144 A. 301.

Moreover, a breach of contract caused by a buyer's insistence on more expensive materials in making articles than was contemplated between the parties, is equivalent to a repudiation of the contract, or notification to the seller not to proceed, in so far as it bears upon the rights of the seller. *Capitol Paper Box Inc. v. Belding Hosiery Mills, Inc.*, 350 Ill. App. 68, 111 N.E. 2d 858. Where damages are claimed, not for the direct injury, that is, the loss of the value of the contract itself, but for consequential loss, as in the instant case, the plaintiff cannot recover for such loss, if he might reasonably have avoided it. *Bear Cat Mining Co. v. Grasselli Chemical Co.*, 247 F. 286 (C.C.A. 8).

It follows, from the foregoing, that where there has been a breach of contract, a party does not have the right to take action which serves only to cause damage to the other party. In the instant case, if there was a breach of contract, it justified non-performance by Rosenberg; but, if there was such a breach, it was not the breach that created the damages, but, rather, Rosenberg's action in performing the contract; and it cannot pile up damages against the government by such conduct.

Here, Rosenberg, in order to save itself from loss, according to its own claim, was not obliged to make any exertion or indulge in any expense whatever. It had purchased no raisins and delivered none for months after the claimed breach by the government. The contract, at the time of the breach and for months afterward, was wholly executory. In executory contracts covering a period in the future, it is the duty of a party whose contract has been broken to take reasonable steps to minimize his damages. *Kessler v. Jefferson Storage Corp.*, 125 F.2d 108 (C.C.A. 6). Rosenberg claimed that it commenced the delivery of raisins, three months after the alleged breach, at the contract prices, by purchasing them at such high prices that it suffered a loss of $329,437.53. Accepting its contention as to the damages it suffered—which is most questionable, in our view—it follows that Rosenberg deliberately enhanced the loss instead of using reasonable care and diligence to avoid or lessen it; and, accordingly, it cannot recover.

In addition, after the alleged breach, or breaches, had occurred, Rosenberg performed the contract and accepted the prices stipulated therein. In *Francis v. United States*, 96 U.S. 354, 360, where a dispute arose between a contractor for the delivery of a commodity and government officials as to how the contract was to be carried out, and although the

contractor would legally have been able to recover the extra expense caused him by improper interference on the part of such officials, nevertheless, when the contractor delivered the commodity under the contract, collected and received the contract price, and gave receipts in full as for a transaction completed pursuant to the contract, it was held that such actions proved an accord and satisfaction and he could not recover for the extra expense. See also *Willard, Sutherland & Co. v. United States*, 262 U.S. 489.

There was, in fact, no disputed claim on Rosenberg's part, which was advanced by it or recognized by the government, when Rosenberg performed the contracts. It had previously, in October, 1947, asked the government to let it out of its contracts. But the government refused. In January, 1948, the government called upon Rosenberg to perform, after it had long been in default. When the contract was reinstated, at Rosenberg's request, with an extension of time for delivery, the government, in writing, required delivery at the contract price, and agreed that if such delivery was made, it would waive any claim for damages for nondelivery. It is true that Rosenberg, through its official in charge, proposed that the reinstatement of the contracts contain a provision reserving to Rosenberg the right to assert a claim against the government. But, before delivery of the raisins under the contract, the government rejected such proposal. Rosenberg thereafter performed the contract, delivering the raisins during the next two months at the contract prices, and billed the government upon standard voucher forms, certifying that the bills presented were correct and just and that all conditions applicable to the transaction had been complied with. No reservations of any kind were contained in the voucher forms; and Rosenberg accepted payment of such vouchers, at the contract prices.

Where a party, following a dispute as to the price due, performs the contract and accepts the stipulated price, it cannot then claim damages for a breach of contract. *Early & Daniel Co. v. United States*, 271 U.S. 140.

In consideration of the foregoing, the judgment of the district court is reversed, and the complaint, dismissed.

DENMAN, CHIEF JUDGE, Concurring in the result:

The determining question in this case is whether Rosenberg Bros., in fixing the amounts of its bids to sell to the Commodity Credit Corporation raisins which it did not then have, can rely on that Corporation's statement on September 5, 1947, that it intended to purchase "a maximum of . . . 61,000 tons of [Thompson seedless] raisins" conditioned by the following, "if the purchase of this total quantity . . . is necessary to provide outlets for the relatively large 1947 production."

If such a statement had been made by a private corporation having a wide market control, it well could be argued that having made bids a dealer like Rosenberg Bros. could hold the corporation liable if, after accepting a bid it then proceeded so to increase its purchases that the costs of the raisins to Rosenberg were thereby increased. In such a situation, Rosenberg might be entitled to recover damages based upon the cost to it of the raisins if the 61,000 ton representation had been complied with.

However, the Commodity Credit Corporation is not such an ordinary buyer. It is a government institution whose duty with respect to the Thompson seedless raisin industry is stated by Congress in the Act creating it to be that of "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of

facilitating the orderly distribution"[1] thereof. It seems clear that the policy announced by Congress in this statute requires that the Corporation be free at all times to adjust and readjust its operations to changing conditions in order to achieve its objectives. Rosenberg is, of course, charged with knowledge of the governmental purpose of the Commodity Credit Corporation.

Here it is unquestioned that the statement of the anticipated limit of raisin purchases was made sometime before the harvesting had begun of the grapes to be later cured as raisins. It is obvious that the total quantity of raisins ultimately to be produced from the Thompson seedless grapes might differ from the amount on which the statement of September 5th was based. Likewise the foreign and domestic demand for such raisins against the competition of other dried fruits and confections might be so much less than expected as to require the purchase by the government of an even greater amount than that stated on September 5th, in which event it would be the duty of the governmental corporation to increase its purchases thereby "supporting and protecting farm income and prices". That is to say, the maximum quantity of Thompson seedless raisins to be purchased specified in the September 5th announcement well might prove to be insufficient and require eventual enlargement. So also the production may have been less or the foreign and domestic demand greater, requiring government purchase of a lesser amount than 61,000 tons.

All the above must be deemed obvious to a bidder offering to sell raisins under the request for bids later made by the Corporation, and hence such bidder must be deemed to have accepted the chance of lesser profit or loss by a decrease or

[1]Title 15, U.S.C., Section 714.

a larger profit by an increase of the amount of Thompson raisins available for purchase.

It well may be that the action of the Corporation would warrant the unilateral rescission of the contracts of sale. That question, however, is not before us because instead of rescinding, Rosenberg Bros. proceeded to perform the contract and is not entitled to recover on the basis of the increased cost of the raisins, having entered, as stated, into the contracts charged with the knowledge of the obligation of the Corporation to increase or decrease its purchases should conditions so require.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 7, 1957.

Paul P. O'Brien, Clerk.